Supreme Court, U.S.
FILED
OCT 15 2004
OFFICE OF THE CLERK

No. 03-287

IN THE

Supreme Court of the United States

REGINALD WILKINSON, DIRECTOR, *et al.*,

Petitioners,

v.

WILLIAM DWIGHT DOTSON, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT ROGERICO J. JOHNSON

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QUESTIONS PRESENTED

1. May a state prisoner bring a suit under 42 U.S.C. § 1983 that seeks a new discretionary parole hearing (among other relief), rather than under the habeas corpus provision with its state-court exhaustion requirements, *see* 28 U.S.C. § 2254, when success on the § 1983 suit would not demonstrate that the prisoner is "in custody in violation of the Constitution or laws or treaties of the United States," *id.* at § 2254(a)?

2. If the answer to Question No. 1 is "no," where Ohio has afforded Respondent a subsequent parole hearing that is not challenged in this case, may Respondent maintain a § 1983 suit seeking only prospective relief and nominal damages for constitutional violations that occurred in the earlier hearing, which no longer has any effect at all on his confinement?

PARTIES TO THE PROCEEDINGS

The Petitioners are Reginald Wilkinson, the Director of the Ohio Department of Rehabilitation and Correction, and Margaret Ghee, the former chair of the Ohio Parole Board. The Respondents are Rogerico J. Johnson and William D. Dotson, both prisoners in custody of the Ohio Department of Rehabilitation and Correction.

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BRIEF FOR RESPONDENT JOHNSON

The *en banc* majority of the Court of Appeals for the Sixth Circuit correctly determined that Respondent Johnson may proceed with his § 1983 claims challenging the guidelines and procedures employed in his April 1999 parole hearing.

Respondent's claims are not required to be brought under the habeas corpus provision, 28 U.S.C. § 2254(a). This is because parole-determination decisions are highly discretionary (as Petitioners admit (Pet. Br. at 6)) and, therefore, a successful challenge to a parole proceeding carries no necessary consequence for the legality of the prisoner's confinement. And, in all events, Respondent Johnson's § 1983 challenge to the April 1999 parole hearing could have no bearing whatsoever on the legality of his present or future confinement, because the Ohio Parole Board has subsequently afforded Johnson a new parole hearing (in July 2001) that is not the subject of this suit.

OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 4a - 35a) was issued on May 19, 2003 and is reported at 329 F.3d 463 (6th Cir. 2003).

The judgment of the United States District Court for the Northern District of Ohio (Pet. App. 56a), as well as the accompanying opinion (Pet. App. 52a - 55a), were issued on July 18, 2000. The opinion is unreported.

JURISDICTION

The *en banc* opinion of the United States Court of Appeals for the Sixth Circuit was issued on May 19, 2003. The petition for writ of certiorari was filed on August 18, 2003, and granted on March 22, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(l).

STATUTES INVOLVED

Section 1983 of Title 42 provides, in pertinent part, that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Section 2254 of Title 28 provides, in pertinent part, that:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –
>
> > (A) the applicant has exhausted the remedies available in the courts of the State; or
> >
> > (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

STATEMENT

A. Parole

Parole is an administrative or executive action to allow a prison inmate "to serve the remaining part of his prison term

outside prison with supervision and within the community."[1] 1 NEIL P. COHEN, THE LAW OF PROBATION & PAROLE § 4:1, at 4-2 (2d ed. 1999). It operates in the context of an indeterminate sentencing scheme, under which a court imposes a minimum and maximum sentence, but does not set a specific release date within that range. Once the inmate has served the minimum sentence, he becomes eligible for parole consideration. *See* ARTHUR W. CAMPBELL, LAW OF SENTENCING § 17:7 (2d ed. 1991). If parole is granted, the parolee is permitted to reenter the community and to serve the remainder of the sentence under conditions imposed by the parole board. COHEN, *supra*, § 4:1. Ohio employs an indeterminate sentencing system, along with parole, for most crimes committed before July 1, 1996. Under this system, an inmate serving time for a felony is typically eligible for parole at the expiration of the minimum term. Ohio Rev. Code Ann. § 2967.13(A).

In Ohio, as in most states employing parole, whether parole should be granted is generally a discretionary decision vested in the parole board. *See, e.g., Inmates of Orient Correctional Inst. v. Ohio State Adult Parole Auth.*, 929 F.2d 233, 236 (6th Cir. 1991). Moreover, as this Court has stated with regard to Nebraska's parole process:

> The parole-release decision . . . depends on an amalgam of elements, some of which are factual but many of which are purely subjective appraisals by the Board members based upon their experiences with the difficult and sensitive task of evaluating the advisability of parole release. Unlike the [parole] revocation decision, there is no set of facts which, if shown, mandate a decision

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[1] *See, e.g., United States v. Einspahr*, 35 F.3d 505, 507 (10th Cir. 1994) (parole does not terminate the sentence that the prisoner is serving; supervision in a prison setting is replaced by supervision by parole and probation authorities).

> favorable to the individual. The parole determination, like a prison transfer decision, may be made "for a variety of reasons and often involve[s] no more than informed predictions as to what would best serve [correctional purposes] or the safety and welfare of the inmate."

Greenhnoltz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 9-10 (1979); *id.* at 10 (parole decision turns on a "discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done").

Although the mix of factors that go into a parole-release decision varies among the states – and even from case-to-case within a state – certain specific factors are almost always considered, including the inmate's: (i) criminal record; (ii) institutional record and adjustment (including participation in rehabilitative and community release programs); (iii) achievements while incarcerated, including educational achievements; (iv) physical, mental and moral rehabilitation; and (v) post-release parole plans. *See* COHEN, *supra*, § 4:32. This is true in Ohio, where the Parole Board's regulations set forth a non-exhaustive list of some 16 separate factors that may be considered in making the parole decision.[2] Ohio Admin. Code § 5120:1-1-07(C)(1) - (16) (2002).

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[2] The 16 permissible factors considered by the Parole Board are:

(a) the inmate's ability and readiness to assume obligations and undertake responsibilities, as well as the inmate's goals and needs;

(b) the inmate's family status, including whether his relatives display an interest in him or whether he has other close and constructive association[s] in the community;

(c) the type of residence, neighborhood, or community in which the inmate plans to live;

(d) the inmate's employment history and his occupational skills;

(e) the inmate's vocational, educational, and other training;

Although some statement of reasons for a parole denial is customary in most states, few require that it be precise or specific. *See* COHEN, *supra*, § 6:24. And because the ultimate decision is highly discretionary, the weight actually afforded the particular factors is "virtually impossible to establish" in any particular case. *See id.* § 4:32, at 4-62. In Ohio, the Parole Board is required to give the inmate the actual decision "verbally and in writing"; a more specific written explanation is not required unless the Parole Board's decision is contrary to the established guidelines. ODRC Policy 501-36 § VI(D)(4) (Pet. Br. at S-16).

A recent trend in parole is the use of written guidelines by parole boards to assist in making parole-release decisions.

(f) the adequacy of the inmate's plan or prospects on release;

(g) any recommendations made by the sentencing courts;

(h) the inmate's conduct during his term of imprisonment;

(i) the inmate's behavior and attitude during any previous experience of probation, furlough, parole, or other administrative release and the recency of such experience;

(j) the availability of community resources to assist the inmate;

(k) the nature of the offense for which the inmate was convicted;

(l) the inmate's pattern of criminal or delinquent behavior prior to the current term of imprisonment;

(m) the physical and mental health of the inmate as they reflect upon the inmate's ability to perform his plan of release;

(n) the presence of outstanding detainers against the inmate;

(o) any recommendations made by the staff of the department of rehabilitation and correction or any of its agencies; and

(p) any other factors which the board determines to be relevant . . . .

Ohio Admin. Code § 5120:1-1-07(C)(1) - (16) (2002). Notably, the Model Penal Code sets out a similar non-exhaustive list of factors that should be considered in making parole-release decisions. *See* Model Penal Code § 305.9(2) (A.L.I. 1985).

See COHEN, *supra*, § 4:34. As is currently the case in Ohio,[3] these guidelines typically take the form of a chart that specifies the approximate parole release date for prisoners whose crimes and personal histories fit predetermined categories. *Id.* Usually the categories rate both the severity of the offense and various dimensions of the offender's history to determine the likelihood that the inmate will commit additional crimes. Ohio implemented such a two-factor grid system in 1998 (the "1998 Guidelines") and has applied it to all parole hearings after that date.

"Once this information is quantified, the board has a numerical score which determines the inmate's presumptive parole date. The board is usually given the discretion to depart from the guidelines in unusual cases when aggravating or mitigating factors make departure appropriate."[4] *See* COHEN, *supra*, § 4:34. This is true in Ohio, where the intersection on the grid yields a suggested range of months, which, as Petitioner admits, the Parole Board "usually follows." (Pet. Br. at 7.)

B. Proceedings Below

Respondent Rogerico Johnson is serving three indefinite sentences: one for his conviction in 1992 for aggravated robbery, a second for his conviction in 1992 for certain offenses related to his attempt to grab an officer's gun at a hearing contesting the robbery conviction, and a third for his 1998 conviction for assaulting a prison guard.

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[3] Ohio's parole guidelines can be accessed online at: http://www.drc.state.oh.us/web/Guideline%20Manual04.pdf (last visited October 14, 2004).

[4] Among other purposes, these guidelines help to "minimize disparity in sentencing and in parole release decisions by providing uniform parole release dates for similar offenders," and to "structure the parole board's exercise of discretion to release inmates." COHEN, *supra*, at § 4:34.

On April 9, 1999, Respondent Johnson had his first parole hearing. Parole was denied. Numerous irregularities occurred in the course of the April 1999 parole hearing. For one, the Parole Board applied parole guidelines that it implemented in April 1998 – *i.e.*, the 1998 Guidelines – which was well after the crimes for which Respondent was convicted. And, as Petitioners acknowledge, inmates "convicted of more serious crimes [like Respondent] generally serve longer periods of incarceration under the 1998 Guidelines than they did under the prior guidelines." (Pet. Br. at 7.)

In addition, numerous procedural violations occurred during the April 1999 parole hearing. For example, the hearing was conducted by one member of the Ohio Parole Board, despite regulations requiring two members to preside over that hearing. *See* Ohio Admin. Code § 5120:1-1-11(C) (recommendations for or against release can only be made by "a panel consisting of one or more members of the Parole Board *and* one or more Parole Board hearing officers").

Likewise, Respondent was not permitted to speak, be heard or otherwise interact with the lone hearing officer during his April 1999 hearing – actions also in violation of the Parole Board's regulations. *See id.* § 5120:1-1-07(B)(7) (providing that at the hearing the parole panel shall consider, among other things, "[w]ritten or oral statements by the inmate"). And the Parole Board decision delivered to Respondent after the hearing afforded no opportunity to provide comment, remarks or rebuttal to the parole decision.

Thus, Respondent had no opportunity to meaningfully participate in the parole-decision process, either before or after the Parole Board's decision. This proved to be a matter of some consequence, because Respondent later discovered that his parole file was riddled with errors that he was unable to dispute before a parole decision was made. For example, his file contained findings of misconduct for which he had never been charged or disciplined.

Inquiries made by Respondent following his hearing and denial of parole revealed that many other prisoners in Ohio penitentiaries were experiencing quite violations of their rights. Many who committed their crimes before April 1998 were having their parole decisions made on the basis of the 1998 Guidelines. And many other inmates had also been subjected to procedural improprieties like those Respondent experienced during his April 1999 hearing.

Based upon this additional information, on April 26, 2000, Respondent, acting *pro se*, filed a complaint against Margaret Ghee, Chairperson of the Ohio Parole Board, under 42 U.S.C. § 1983. In his complaint, Respondent alleged that application of the 1998 Guidelines to him violated his constitutional guarantee against *ex post facto* laws,[5] and that the procedural irregularities that occurred during the April 1999 hearing violated his constitutional rights to due process and equal protection of the laws. Respondent sought individual and class-wide prospective injunctive relief on all of these claims,[6] as well as retroactive injunctive relief in the form of an order granting him a new hearing based on the deficiencies alleged in the hearing of April 1999.[7] Respondent's complaint did not name the correctional facility warden as a defendant, nor did Respondent challenge

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[5] U.S. CONST. art. I, § 10 ("No State shall . . . pass any Bill of Attainder, ex post facto Law . . . ."). *See generally* Wayne Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261 (1998).

[6] Included with Respondent's *pro se* complaint were affidavits from Ohio inmates that detailed the alleged procedural irregularities that Respondent sought to rectify on his and their behalf. (J.A. 55-73.)

[7] Respondent also asserted in the court below that he had a right to recover nominal damages for the violations of his rights at the April 1999 hearing, and Petitioner did not dispute this assertion. *See* Supplemental Brief of Plaintiff/Appellant Rogerico Johnson to the Sixth Circuit, at 2 n.2 (dated Oct. 25, 2002).

the legality of his custody or claim entitlement to immediate release.

Before an answer was filed, on July 18, 2000, the district court *sua sponte* dismissed Respondent's complaint under 28 U.S.C. § 1915(e)(2).[8] The district court determined that none of Respondent's claims was cognizable under § 1983, but could only be brought as habeas corpus claims pursuant to 28 U.S.C. § 2254(a) after Respondent first exhausted his state-court remedies. Respondent timely filed a notice of appeal.

After Respondent filed *pro se* a hand-written appellate brief, the Sixth Circuit appointed counsel to represent him in his appeal. With the assistance of counsel, Respondent filed an additional brief, arguing that the district court erred and that Respondent's challenges to the parole proceedings are cognizable under § 1983, because they do not necessarily imply the invalidity of his continued confinement.

A panel of the Sixth Circuit heard the case on June 18, 2002. Before a decision was rendered, a separate Sixth Circuit panel decided co-Respondent Dotson's appeal in a published opinion. *Dotson v. Wilkinson*, 300 F.3d 661 (6th Cir. 2002). Thereafter, the Sixth Circuit *sua sponte*

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[8] Section 1915(e)(2) provides:

> Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that –
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> (A) the allegation of poverty is untrue; or
>
> (B) the action or appeal –
>
> (i) is frivolous or malicious;
>
> (ii) fails to state a claim on which relief may be granted; or
>
> (iii) seeks monetary relief against a defendant who is immune from such relief.

consolidated the appeals and ordered *en banc* argument, which was presented on December 11, 2002.[9]

Fifteen months after the complaint had been filed, and twelve months after it was dismissed, on July 27, 2001, Respondent was afforded a second parole hearing, at which parole was again denied. (This parole decision is reproduced as an addendum to this brief.) While the fact of this hearing, and its result, were made known to the court below,[10] Respondent has not in this case undertaken to challenge either the result of this second hearing, or the procedures followed therein.

On May 19, 2003, the Sixth Circuit issued its *en banc* decision, holding by a vote of 6 to 4 that Respondent Johnson's claims are cognizable under § 1983.[11] (Pet. App. 5a-6a.) In arriving at this holding, the majority first recognized that, "[u]nder Ohio law, parole is discretionary," so "the impact the new hearings would have on Dotson['s] and Johnson's parole or release is indeterminate." (*Id.* at 17a.) The majority then reinforced the degree to which the outcome of a new parole hearing would be uncertain by observing that:

> [n]ot every procedural defect necessarily has an impact on the ultimate outcome of a procedurally defective hearing. The remedying of many procedural defects will not cause any different outcome at all, much less "necessarily imply" that the prisoner should be released immediately or

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[9] The Sixth Circuit ordered briefing and argument on the "common issue of whether an Ohio state prisoner can use 42 U.S.C. § 1983 to seek damages or a new parole hearing on the ground that an earlier hearing was procedurally deficient." (J.A. 8.)

[10] *See* Supplemental Brief of Plaintiff/Appellant Rogerico Johnson to the Sixth Circuit, at 2 n.2 (dated Oct. 25, 2002).

[11] Neither the majority opinion nor the dissent made any mention of Respondent's July 2001 parole hearing.

> sooner than he would have been released absent the challenge.

(Pet. App. 19a.)

Based on these considerations, the majority set forth what it called "the clearest statement of the standard" it adopted:

> [w]here a prisoner does not claim immediate entitlement to parole or seek a shorter sentence but instead lodges a challenge to the procedures used during the parole process as generally improper or improper as applied in his case, and that challenge will at best result in a new discretionary hearing the outcome of which cannot be predicted, we hold such a challenge cognizable under section 1983.

(Pet. App. 19a-20a.) The majority opinion then concluded by observing that, although a prisoner challenging the parole procedures likely does hope that success on his claim may yield a speedier release from incarceration, that alone is not enough to bar a § 1983 suit:

> [A]n incarcerated person obviously seeks to be released from confinement. A prisoner cares not a whit as to how that happens, but this court must care. We do not read into a legal claim what we know on a human level is realistically there: a prisoner who objects to his confinement may nevertheless raise a section 1983 claim, a legal claim, if his due process rights have been violated and the challenge does not *necessarily* implicate the invalidity of his continued confinement. Johnson and Dotson are not requesting that the parole board make a different decision, although we understand that they wish it would; they are merely requiring that the parole board comply with the law in making that decision.

(Pet. App. 20a.)

The dissent disagreed that Respondent Johnson's challenge is cognizable under § 1983, stating:

> [t]he majority . . . glosses over what I believe is the Supreme Court's actual rule – that it is the *judgment* of the

> administrative body (in this case, the parole board) whose validity may not be questioned by a § 1983 action, regardless of the judgment's effect on the length of the prisoner's underlying conviction or sentence.

(Pet. App. 21a.) Applying its proposed rule to Respondent Johnson's claims, the dissent reasoned "there is no way to characterize the nature of Johnson's challenge as anything other than a claim that necessarily implies the invalidity of a prior state judgment" – *i.e.*, the April 1999 Parole Board decision. (Pet. App. 33a.) As a result, the dissent asserted that Respondent Johnson's § 1983 suit should be barred.[12]

The dissent reached this conclusion based on its view of two Supreme Court decisions: *Heck v. Humphrey*, 512 U.S. 477 (1994), and *Edwards v. Balisok*, 520 U.S. 641 (1997). As the dissent saw it:

> In *Heck*, ... [t]he Court was suggesting that the real problem was not that the prisoner's § 1983 action would necessarily get him out of jail sooner, but rather that the federal courts must not allow the use of § 1983 to imply the invalidity of *any* state criminal judgments relating to the length of a prisoner's incarceration.

(Pet. App. 23a.) The dissent then reasoned that in *Balisok*, "the Supreme Court extended this principle" to bar § 1983 suits that, if successful, would imply the invalidity of a

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[12] Notably, the dissent would have reached the opposite conclusion with respect to Respondent Dotson's claim, which it believed is cognizable under § 1983. (Pet. App. 31a.) Respondent Dotson's claim challenged the decision in his halfway parole review to retroactively apply Ohio's 1998 Guidelines to his *future* parole hearings. Relying on the fact that a halfway parole hearing does not decide the grant or denial of parole, the dissent reasoned that Dotson's § 1983 claim could proceed because "[t]he nature of Dotson's claim . . . does not necessarily imply the invalidity of any judgment by an administrative body that he is or is not entitled to parole." (Pet. App. 28a.)

prison administrative hearing that somehow relates to the length of a prisoner's incarceration. (*Id.*)

Petitioners filed a petition for certiorari on August 18, 2003, which this Court granted on March 22, 2004.

SUMMARY OF ARGUMENT

This Court has articulated a bright-line rule that governs whether a state-prisoner lawsuit may be brought under 42 U.S.C. § 1983, or whether it must be brought under the federal habeas statute, 28 U.S.C. § 2254, which contains stringent state-court exhaustion requirements. When a prisoner's § 1983 challenge seeks a judgment at odds with his conviction or with the State's calculation of time to be served in accordance with the underlying sentence, then he must proceed first in habeas and has no cognizable § 1983 claim unless and until he shows that the underlying conviction or sentence has been terminated in his favor. If however, a prisoner's § 1983 action would not, if successful, demonstrate the unlawfulness of either his conviction or the duration of his sentence, the claim may proceed and need not be brought in habeas.

1. Respondent Johnson's complaint falls well outside the margins of habeas corpus. Respondent challenges neither his conviction, nor the legality of his continued or expected confinement. His challenge to the parole guidelines and procedures employed in the April 1999 parole hearing, if successful, would in no way necessarily affect the duration of his confinement, grant him immediate or speedier release, or entitle him to relief that he otherwise could obtain through a habeas challenge. This is because, as Petitioners admit, parole is a highly discretionary decision that involves an ad-hoc weighing of numerous objective and subjective factors. Thus, a request for a new parole hearing would, if granted, carry no necessary effect on the prisoner's term of incarceration.

2. Respondent's § 1983 action is also cognizable for another, equally compelling reason: He has been afforded a

subsequent parole hearing (in July 2001) that supersedes the April 1999 parole decision. The present § 1983 action makes no claims or assertions at all about the subsequent July 2001 parole denial, and the original request for a new parole hearing based on the violations in the April 1999 hearing is now moot. What is more, the remaining live issues in this case – Respondent's request for prospective injunctive relief and a claim for nominal damages based on the conduct of the April 1999 hearing – can have no effect upon the fact or term of Respondent's incarceration. For this reason, too, Respondent Johnson's § 1983 claim may go forward.

3. This Court should resist Petitioners' invitation to extend the bright-line rule developed through *Preiser*, *Heck* and their progeny, to now bar every § 1983 prisoner challenge that in some way involves challenges to parole hearings. Petitioners' chief argument rests on the flawed premise that parole decisions constitute "sentences" (and, thus, must be challenged in habeas). But they do not. Rather, it has long been held that since parole merely constitutes relief from a sentence already imposed, a denial of parole is in no way the imposition of a "sentence," as Petitioners argue. Indeed, Petitioners gloss over, or ignore altogether, the constitutional significance of treating parole determinations as sentencing decisions. For example, the Constitution entitles criminals at sentencing to be represented by counsel, and, thus, to treat parole decisions as a phase of sentencing would require that prisoners be afforded counsel for such hearings.

4. Petitioners are incorrect, too, in suggesting that *Heck* bars (or should be extended to bar) any prisoner § 1983 challenge that could nullify a state administrative decision relating in any way to his confinement. By this assertion, Petitioners seek to refocus the *Heck* inquiry in a manner that renders irrelevant a lawsuit's necessary effect on the legality of the term of incarceration. But there is no basis to alter the clear test laid out in *Heck*. And, contrary to Petitioners'

assertion and the dissenting opinion below, the fact that Respondent challenges a state administrative proceeding that happens to relate to parole does not – alone – bring that claim within *Heck*'s preclusive reach.

5. Lastly, concerns of "comity and federalism" do not support the expansion of *Heck*, and the resulting limitation on § 1983, as the Petitioners urge. Any federal interest in deferring to either state prison management or state courts is not a basis for extending the *Heck* bar to prohibit § 1983 suits that would not necessarily shorten a prisoner's confinement nor alter the legality of his custody. Indeed, the Prison Litigation Reform Act (PLRA) already accords significant deference to state administrative decisions and requires prisoners to exhaust state remedies – as Respondent did here – before bringing suit under § 1983.

ARGUMENT

Both the Civil Rights Act of 1871, as amended, 42 U.S.C. § 1983, and the federal habeas corpus statute, 28 U.S.C. § 2254, provide state prisoners with "access to a federal forum for claims of unconstitutional treatment at the hands of state officials." *Heck v. Humphrey*, 512 U.S. 477, 480 (1994). However, the two statutes "differ in their scope and operation," which makes it critical to determine which provides the correct vehicle for a state prisoner's suit. *Id.* at 480.

Section 1983 provides broad jurisdiction for federal courts to prevent and redress violations of federal constitutional rights by state actors: "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). It generally allows state prisoners to bring suit without first exhausting their state-court remedies, *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 509 (1982), and it empowers federal

courts to redress past or threatened violations with the full panoply of remedies – damages, retroactive injunctive relief, and prospective injunctive relief, 42 U.S.C. § 1983 (expressly authorizing both legal and equitable relief); *see generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 8.11 (3d ed. 1999).

On the other hand, the habeas corpus statute is narrower in scope and operation, affording federal court jurisdiction over claims only by "person[s] in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). "[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody."[13] *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973). It authorizes federal court jurisdiction over state inmate claims which, if successful, would require the federal court to find that the prisoner is (or in the future will be) in custody in violation of the Constitution or other federal laws. *See Peyton v. Rowe*, 391 U.S. 54, 58 (1968). Critically, before bringing a habeas action, a state prisoner must first "exhaust[] the remedies available in the courts of the State." 28 U.S.C. § 2254(b).

While the broad language of § 1983 on its face covers all state prisoner suits alleging violations of federal rights, even those that are cognizable in habeas, the Court has held that "despite the literal applicability of its terms," § 1983 has no application where "the specific federal habeas corpus statute, explicitly and historically designed to provide the means for

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[13] *See Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2717-18 (2004) ("We summed up the plain language of the habeas statute over 100 years ago in this way: '[T]hese provisions contemplate a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such party before the court or judge, *that he may be liberated if no sufficient reason is shown to the contrary.*'" (quoting *Wales v. Whitney*, 114 U.S. 564, 574 (1885)) (emphasis added)).

a state prisoner to attack the validity of his confinement," applies. *Preiser*, 411 U.S. at 489. To prevent state prisoners from using § 1983 to circumvent the habeas corpus exhaustion requirement, this Court has undertaken, in a series of decisions, to define the class of cases in which an action in habeas is either the only available avenue of relief, or must be successfully pursued as a prerequisite to a money-damages claim under § 1983.

I. THIS COURT HAS CONSISTENTLY PERMITTED § 1983 PRISONER CHALLENGES THAT, IF SUCCESSFUL, WOULD NOT NECESSARILY UNDERMINE THE LEGALITY OF THE PRISONER'S CONVICTION OR TERM OF INCARCERATION

In *Preiser v. Rodriguez*, this Court set out guiding principles regarding when state prisoner claims that are included within the broad reach of § 1983 must nonetheless be brought in habeas. The *Preiser* inmates alleged "that the deprivation of their good-conduct-time credits was causing or would cause them to be in illegal physical confinement, *i.e.*, that once their conditional-release date had passed, any further detention of them in prison was unlawful." 411 U.S. at 487. As Petitioners correctly note in their brief, "*Preiser* determines whether a prisoner's claim falls within that region [of claims that must be brought in habeas] by examining the relief sought." (Pet. Br. at 32.) *Preiser* held that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, *and the relief he seeks is a determination that he is entitled to immediate release or a speedier release* from that imprisonment, his sole federal remedy is a writ of habeas corpus." *Id.* at 500 (emphasis added).

In reaching that holding, the *Preiser* Court first observed that "[i]t is clear" from the language of § 2254(a) "that the traditional function of the writ is to secure release from illegal custody," *id.* at 484, that is, "custody in violation of

the Constitution or laws or treaties of the United States," 28 U.S.C. § 2254(a). The *Preiser* Court confirmed this by examining "the common-law history of the writ," concluding that first in England, and then in this country, habeas has been a mechanism to "inquire into illegal detention with a view to an order releasing the petitioner."[14] 411 U.S. at 484 (quoting *Fay v. Noia*, 372 U.S. 391, 399 n.5 (1963)). The Court further explained that, "over the years, the writ of habeas corpus evolved as a remedy available to effect discharge from any confinement contrary to the Constitution or fundamental law, even though imposed pursuant to conviction by a court of competent jurisdiction." *Id.* at 485. Indeed, the inmates in *Preiser* were seeking just such relief. Their assertions of constitutional violations, if successful, would have entitled them to immediate or earlier release from confinement – the very relief specially reserved for the writ of habeas corpus.

The next year, in *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Court addressed a Nebraska state prisoner class-action under § 1983 which challenged, *inter alia*, the procedures used in prison disciplinary hearings resulting in

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[14] Indeed, the Court even set out examples of unlawful detentions subject to habeas corpus review, where success on the inmate's petition necessarily would result in immediate or speedier release:

> Thus, whether the Petitioner's challenge to his custody is that the statute under which he stands convicted is unconstitutional; that he has been imprisoned prior to trial on account of a defective indictment against him; that he is unlawfully confined in the wrong institution; that he was denied his constitutional rights at trial; that his guilty plea was invalid; that he is being unlawfully detained by the Executive or military; or that his parole was unlawfully revoked, causing him to be reincarcerated in prison – in each case his grievance is that he is being unlawfully subjected to physical restraint, and in each case habeas corpus has been accepted as the specific instrument to obtain release from such confinement.

411 U.S. at 486 (citations and footnote omitted).

the withdrawal of good-time credits. The state prisoners requested both the restoration of good-time credits, and prospective injunctive relief and damages based on the procedures employed in the prison disciplinary hearings. Following *Preiser*, the Court held that to the extent "the state prisoners were challenging the very fact or duration of their confinement and were seeking speedier release, their sole federal remedy was by writ of habeas corpus." *Wolff*, 418 U.S. at 554. On the other hand, the Court reasoned that the challenge to the hearing procedures were appropriately reviewed under § 1983, and that the court below could "determine the validity of the procedures for revoking good-time credits and . . . fashion appropriate remedies for any constitutional violations ascertained, short of ordering the actual restoration of good-time already cancelled." *Id.* at 555 (footnote omitted).

In *Heck v. Humphrey*, the Court faced a situation not literally covered by *Preiser*'s rule of looking to the relief sought by the inmate. In *Heck*, an inmate sought damages under § 1983 for various alleged violations of constitutional rights committed by state officials in the investigation leading to the inmate's conviction. Notwithstanding the fact that the inmate's complaint did not include an overt challenge to the legality of his continuing incarceration, the Court concluded that the suit should not be allowed to go forward under § 1983 if its necessary consequence would be to collaterally attack his conviction and demonstrate the illegality of the inmate's continued confinement:

> Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal

judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

512 U.S. at 487 (emphasis in original, footnotes omitted).

This rule is the logical and necessary corollary to the holding in *Preiser* that a state prisoner's sole federal remedy is a habeas action when "he seeks . . . a determination that he is entitled to immediate release or a speedier release." *Preiser*, 411 U.S. 500. The *Heck* rule ensures that, just as a prisoner may not bring a § 1983 action that would, if successful, directly entitle him to an immediate or speedier release from custody, so too a prisoner may not indirectly avoid the habeas exhaustion requirements by bringing a § 1983 damage suit if success on the suit would "necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement." *Heck*, 512 U.S. at 486. In this way, both *Preiser* and *Heck* are in keeping with the text of the habeas provision, because the effect of both holdings is to channel a state prisoner's suit into habeas if success in the suit would actually demonstrate, regardless of the relief sought, "that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

Subsequently, in *Edwards v. Balisok*, 520 U.S. 641 (1997), the Court addressed the § 1983 action of an inmate who sought declaratory and prospective injunctive relief, and damages, based upon alleged violations of due process in a prison disciplinary proceeding that resulted in the loss of 30 days' good-time credit. The inmate expressly excluded from his prayer for relief restoration of the good-time credits, and reserved the right to seek that relief in an appropriate forum, via a habeas action. *Id.* at 644. But the Court applied the central teaching of *Heck* to this § 1983 challenge to a prison administrative decision that revoked good-time credits (and, thus, that resulted in an extension of a prisoner's term of incarceration). *Id.* at 646. While acknowledging that some

procedural challenges, even if successful, may not necessarily lead to invalidation of a decision to revoke good-time credits, the Court ruled that this plaintiff's § 1983 claim of deceit and bias by the state administrative decisionmaker would, if successful, necessarily demonstrate the invalidity of the withdrawal of good-time credits and the resulting extension of his term of incarceration. Accordingly, this Court concluded that the inmate's § 1983 deceit-and-bias claim was *Heck*-barred. *Id.* at 647-48.

The Court's unanimous decision last term in *Muhammad v. Close*, 124 S. Ct. 1303 (2004), reemphasized that not all inmate challenges to prison administrative proceedings are barred by *Heck*. In that case, the inmate brought a § 1983 suit after receiving administrative discipline resulting from misconduct relating to a confrontation with a guard. *Id.* at 1305. The inmate's amended complaint challenged neither the misconduct finding nor the subsequent disciplinary action. Instead, he sought only compensatory and punitive damages for his pre-hearing detention. *Id.*

In reversing dismissal of the suit, the Court again emphasized that § 1983 challenges that "threaten[] no consequence for [a prisoner's] conviction or the duration of his sentence" may proceed. *Id.* at 1304 (footnote omitted). This is so because "[t]here is no need to preserve the habeas exhaustion rule and no impediment under *Heck* in such a case." *Id.* at 1304-05. The Court corrected the lower court's "mistaken view expressed in Circuit precedent that *Heck* applies categorically to all suits challenging prison disciplinary proceedings," because such determinations "do not as such raise any implication about the validity of the underlying conviction, and although they may affect the duration of time to be served (by bearing on the award or revocation of good-time credits) that is not necessarily so." *Id.* at 1306. Thus, the inmate's action could proceed under § 1983 because it did not allege claims cognizable in habeas:

> [H]e raised no claim on which habeas relief could have been granted on any recognized theory, with the consequence that *Heck*'s favorable termination requirement was inapplicable.

Id.[15]

What emerges from these cases is a coherent distinction between claims that must be brought first in habeas corpus, and claims permissibly brought at the outset under § 1983. That distinction turns on whether an inmate's claims, if successful, would necessarily alter the legality of his term of custody, such that absent further action by the state (*e.g.*, a new conviction, a new parole-revocation hearing, a new prison-disciplinary hearing)[16] the prisoner would be entitled to immediate or speedier release from custody.

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[15] Similarly, the Court's decision last term in *Nelson v. Campbell*, 124 S. Ct. 2117 (2004), confirmed the viability of a § 1983 suit that does not challenge the legality of a sentence – there a death penalty. The inmate brought a § 1983 challenge alleging that the use of a "cut down" procedure to gain pre-execution venous access was unconstitutional. The Court held that the claim was cognizable under § 1983 because it would not demonstrate the illegality of the state's death penalty, as alternative means existed to carry out the sentence. *Id.* at 2125.

[16] Although habeas jurisdiction is triggered where the prisoner's constitutional claim would, if successful, necessarily yield an immediate legal effect on his term of custody, there need not be a guarantee that the prisoner will be immediately or sooner released. For example, where an unconstitutional conviction is overturned, the state may retry the defendant; where a procedurally defective parole-revocation decision is thrown out, the state may have a rehearing and again revoke the prisoner's parole; and, where a defective prisoner-disciplinary hearing that resulted in the loss of good-time credits is set aside, the state may have a new hearing and again take away the credits. In each of these instances, however, the action must be pursued in habeas, because the prisoner's constitutional challenge, if successful, would establish the illegality of his current or expected custody.

Moreover, it matters not whether that result is actually sought by the inmate, as in *Preiser*, or foresworn, as in *Balisok*. Nor does it matter whether release or shortening of custody would follow from a ruling that invalidates the underlying criminal conviction as in *Heck*, or from one that invalidates a state administrative ruling, as in *Preiser* and *Balisok*.

Rather, what is critical to any conclusion that claims must be brought initially in habeas is the fact that those claims – whatever their basis and whatever action their ultimate target – will, if successful, have a direct or necessary effect on the lawfulness of the fact or duration of the prisoner's confinement (absent further state action). Claims of a state inmate which, if successful, will have no necessary effect on his continuing custody or the legality of his confinement may proceed under § 1983. That is as it must be, since the habeas statute affords federal court jurisdiction over the claims of a state inmate "only on the ground that [the prisoner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

II. CLAIMS THAT SEEK A NEW PAROLE HEARING ARE COGNIZABLE UNDER § 1983 BECAUSE, IF SUCCESSFUL, THEY WOULD NOT DEMONSTRATE "THAT [THE PRISONER] IS IN CUSTODY IN VIOLATION OF THE CONSTITUTION OR LAWS . . . OF THE UNITED STATES"

Respondent originally sought "a new parole hearing" (Pet. Br. at 14) in which the proper parole guidelines and procedures would be followed. He made this request because, at the time suit was filed, the only parole hearing he had been afforded was the one in April 1999, which, he alleged, was substantially defective on both *ex-post-facto* and procedural-due-process grounds. Based on both of these claims, Respondent also sought prospective injunctive and declaratory relief.

Respondent Johnson's challenge to the April 1999 parole hearing, insofar as it requests a new parole hearing, has been eliminated by the State of Ohio's action in conducting a subsequent hearing in July 2001. That later hearing, which is not at issue in this case,[17] is the one that now impacts on Respondent's continued incarceration, and the earlier hearing that is challenged in this suit is of no continuing legal consequence to Respondent's current or future incarceration.[18] Further, as set forth in Section III, *infra*, neither Respondent Johnson's remaining claims for

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[17] Indeed, the subsequent July 2001 hearing occurred after both the filing of the complaint and its *sua sponte* dismissal by the district court.

[18] This matter is not moot, because Respondent *still* retains live claims for declaratory and prospective injunctive relief, as well as an intention to amend upon remand to seek nominal damages based on the events at the April 1999 hearing. Petitioners have not challenged Respondent's claims for declaratory and prospective injunctive relief and nominal damages, and the Sixth Circuit did not pass on the viability of those claims.

Moreover, Respondent's prospective injunctive relief claim is not moot because, as this Court has repeatedly made clear, "'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth v. Laidlaw Environmental Servs.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). Rather, only where the defendant meets its "heavy burden" of making "it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur" will mootness be found. *Id.* at 189 (internal quotation marks omitted). Here, the Petitioners have not met that burden, because they have not shown that Ohio has ceased either its pattern of depriving prisoners of procedural protections in parole hearings or applying the 1998 Guidelines to state prisoners convicted of offenses committed before the Guidelines were promulgated.

Notably, standing is not at issue, most obviously because standing is measured at the commencement of the litigation, *see, e.g.*, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 109 (1998), and Respondent plainly had standing when he filed suit in July 2000 to challenge the violations that allegedly occurred during his April 1999 hearing.

declaratory and prospective injunctive relief, nor a claim for nominal damages based on the events of April 1999 hearing, is required to be brought in habeas.

A. Even Before Respondent Was Afforded A New Hearing In July 2001, None Of Respondent's Claims Had To Be Brought In Habeas Because None Of Them Would Have Demonstrated The Invalidity Of The Fact Or Duration Of Respondent's Confinement

Leaving aside the fact of the new July 2001 parole hearing, and viewing Respondent's suit as of the time of filing – which included a request for a new parole hearing based on the violations in the April 1999 hearing – the suit was properly brought under § 1983, because success in the suit would not have led to a holding that demonstrated the invalidity of the fact or term of Respondent's incarceration. At most, success would have produced an order for a new parole hearing, as well as prospective relief correcting unconstitutional procedures and prohibiting *ex-post-facto* application of parole guidelines.

A critical element of the Court's ruling in *Preiser* requiring claims for the "restoration of those good-time credits" to be brought in habeas was the fact that such a ruling would have demonstrated the invalidity of the prisoners' confinement and, therefore, would have required the prisoners' "immediate release from physical custody." 411 U.S. at 487. However, because parole, in Ohio and elsewhere, is ultimately a matter of discretion, *see, e.g.*, *State ex rel. Duganitz v. Ohio Adult Parole Authority*, 672 N.E.2d 654, 656 (Ohio 1996), Respondent's original request for a new hearing would not have demonstrated the invalidity of his confinement and, thus, would have had no necessary effect on the duration of his confinement.

As Petitioners concede in their opening brief, "[t]he statutory standard for [parole] release is broad. It authorizes parole if the [parole board] determines it 'would further the

interests of justice and be consistent with the welfare and security of society.'" (Pet. Br. at 6.) Indeed, Petitioners go on to acknowledge that "it is well settled that the Parole Board *can* deny release for any constitutionally permissible reason or for no reason at all.'" (Pet. Br. at 6 (quoting *Inmates of Orient Correctional Inst. v. Ohio State Adult Parole Auth.*, 929 F.2d 233, 236 (6th Cir. 1991) (emphasis in Pet. Br.).)

In light of the extraordinary discretion that Petitioners admit the Parole Board has to deny parole, a claim seeking a new parole hearing is in no way, itself, a demand for immediate or speedier release, nor, if successful, would it "necessarily demonstrate[]" the unconstitutionality of his confinement. *Heck*, 512 U.S. at 481-82. To the contrary, all that such a suit can possibly produce is an opportunity to have one's parole denial reconsidered in a new hearing – by officials who are afforded broad discretion to grant or deny parole as they see fit. This, of course, is in contrast to a federal court order reversing a criminal conviction, or restoring good-time credits, or reversing a parole revocation – all of which must be pursued in habeas because each immediately makes plain that the state prisoner's custody or term of incarceration is in "violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2254(a).

Amici for the Petitioners contend that all of this should be overlooked because, "on a human level," there "is no conceivable reason, other than for the purpose of obtaining earlier release from his confinement, that an inmate would go to the trouble of challenging the parole procedures applied to him." (Br. *Amici Curiae* of Alabama, *et al.* at 7.) But this argument ignores the bright-line rule set out in this Court's decisions, and the plain language of the habeas statute, which only provides jurisdiction where a state prisoner is alleging "that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Seeking to have one's parole status considered again in a discretionary proceeding, because a

prior hearing was procedurally defective, simply does not amount to a claim that the fact or duration of one's incarceration is in violation of federal law.

Heck v. Humphrey sets out two contrasting examples to illustrate that § 1983 jurisdiction is foreclosed only in those cases where a conclusive holding as to the illegality of the fact or duration of confinement follows *necessarily* from the claims asserted by the inmate. The first involved a state prisoner who had been "convicted of and sentenced for the crime of resisting arrest, defined as intentionally preventing a peace officer from effecting a *lawful* arrest," and who then brought a § 1983 action "against the arresting officer, seeking damages for violation of his Fourth Amendment right to be free from unreasonable seizures." As this Court explained, "[i]n order to prevail in this § 1983 action, [the prisoner] would have to negate an element of the offense of which he has been convicted," and since this would necessarily demonstrate the illegality of his continued confinement, a "§ 1983 action will not lie." 512 U.S. at 486 n.6 (emphasis in original).

Alternatively, the *Heck* Court offered the example of a state prisoner's § 1983 claim for damages for an allegedly unreasonable search that produced evidence introduced at trial. As to that claim, the Court concluded that, even if successful, such a claim did not necessarily lead to the conclusion that his conviction or sentence was unlawful, and, thus, that the claim could be pursued under § 1983. As this Court explained, such doctrines as inevitable discovery and harmless error meant that "such a § 1983 action, even if successful, would not *necessarily* imply that the plaintiff's conviction was unlawful." *Id.* at 487 n.7 (emphasis in original).

Neither in *Preiser*, nor in any of the cases that have followed, has this Court foreclosed pursuit of a § 1983 action based on the ground that an inmate's present action may be the first step in a chain of events that could culminate in his

"early release." Indeed, if this were the standard, there simply would be no principled basis on which § 1983 actions could proceed on any number of state-prisoner claims that, if successful, could some day have a bearing (no matter how attenuated) on the amount of time that an inmate spends in custody. An inmate who challenges the imposition of such prison discipline as the suspension of certain privileges, for example, is pursuing a claim that may well have a bearing at some point on his term of incarceration. No one would seriously suggest that the mere possibility of a future consequence on the duration of confinement would render such a present challenge unfit for pursuit under § 1983. Indeed, such a conclusion would grossly undermine the effectiveness of the remedy available under § 1983.

B. Petitioners' Argument That Inmate Challenges To Denials Of Parole Must Be Pursued In Habeas Because They Would "Invalidate" State "Sentencing" Decisions Is Without Merit

While correctly stating the rule pronounced in *Heck* – a "prisoner cannot use § 1983 as a vehicle to mount a collateral attack that would 'necessarily imply the invalidity of' state court convictions or sentences," (quoting *Heck*, 512 U.S. at 487) – Petitioners leap to two critical unsupported assertions, ostensibly on the basis of *Balisok*. (Pet. Br. at 3.) The first is that "administrative decisions that affect the duration of a prisoner's confinement [including denials of parole]. . . count as 'sentences,'" for purposes of the *Heck*-bar. The second is that it is enough to trigger habeas jurisdiction if success on the suit "would 'necessarily imply' that a State must vacate a prior [parole] hearing and provide the prisoner a rehearing." (*Id.*)

1. Denials Of Parole Are Not Sentencing Decisions

Petitioners argue that parole decisions are "sentencing decisions," because in addition to deciding whether a prisoner will be released, parole hearings also establish "the next possibility of release by the scheduling of later release hearings." (Pet. Br. at 22.) As Petitioners see it, "this defined impact on duration (*i.e.*, scheduling the next release hearing five years out means the prisoner will serve that time)" makes these "scheduling decisions" nothing less than "sentencing decisions," because they establish the next fixed period of time during which the prisoner will remain in "custody." (*Id.*)

To be sure, an inmate's challenge to his court-imposed sentence is subject to exclusive habeas jurisdiction. *See, e.g.*, *Heck*, 512 U.S. at 487 (challenges to a "conviction or sentence" must be brought in habeas). However, Petitioners' characterization of "parole hearings" as some sort of second phase of sentencing is simply wrong. It is not only inconsistent with the historical and legal understanding of parole, but, if adopted, would carry extraordinary consequences for the parole and sentencing processes. *See, e.g.*, *United States v. Granderson*, 511 U.S. 39, 71 (1994) (Rehnquist, C.J., dissenting) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2068 (1971)) ("Sentence . . . is ordinarily meant in the context of criminal law to refer to the judgment or order by which a court or judge imposes punishment or penalty upon a person found guilty" (internal quotation marks omitted)).

As Petitioners correctly state, "Ohio employs an indeterminate sentencing system for most crimes committed before July 1, 1996. Under that system, the court sets the minimum and maximum term of the sentence." (Pet. Br. at 5.) The Ohio Parole Board, a unit of the executive branch, "then determines whether the inmate will be released before the maximum sentence and, if so, when release will occur."[19] (*Id.*)

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[19] *See generally Garafola v. Benson*, 505 F.2d 1212, 1217 (7th Cir. 1974) ("A major purpose of any indeterminate sentence provision is to

It is well established that, where an indeterminate sentencing system is employed, the actual sentence is "for the maximum period imposed by the court."[20] *Story v. Rives*, 97 F.2d 182, 187 (D.C. Cir. 1938). A parole board's decision to cut short a prisoner's incarceration before the maximum period has expired is, therefore, simply "relief from a penalty that has already been imposed – the full period of incarceration to which [a prisoner has been] sentenced."[21] *Ainsworth v. Stanley*, 317 F.3d 1, 5 (1st Cir. 2002), *cert. denied*, 538 U.S. 999 (2003); *see also State v. Henderson*, 2002 WL 31890341, at *4 (Ohio App. Dec. 31, 2002) (prisoner has no right to be conditionally released on parole "before the expiration of a valid sentence"); *Walls v. Haskins*, 263 N.E.2d 311, 312 (Ohio 1970) ("[P]arole is purely a matter of grace, not of right."). Put differently, a

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give the Parole Board discretion to determine when a prisoner has reached that point in his rehabilitation process at which he should be released under supervision to begin his readjustment to life in the community.").

[20] This was the understanding at common law, and remains the law today. *See, e.g.*, *United States v. Frias*, 338 F.3d 206, 210-11 (3d Cir. 2003); *United States v. Rodriguez-Arreola*, 313 F.3d 1064, 1066 (8th Cir. 2002); *United States v. Cordova-Beraud*, 90 F.3d 215, 219 (7th Cir. 1996); *United States v. Quinonez-Terrazas*, 86 F.3d 382, 383 (5th Cir. 1996) (citing BLACK'S LAW DICTIONARY 694 (5th ed. 1979)); *United States v. Reyes-Castro*, 13 F.3d 377, 380 (10th Cir. 1993); *Sturm v. California Adult Auth.*, 395 F.2d 446, 448 (9th Cir. 1968); *Paladino v. Comm'r of Immigration*, 43 F.2d 821, 822 (2d Cir. 1930).

[21] *See also Fowler v. United States Parole Comm'n*, 94 F.3d 835, 839 (10th Cir. 1996) ("traditional parole is merely 'a conditional release from incarceration . . . prior to the expiration of the full term set by the sentencing court'" (citing *Parry v. Rosemeyer*, 64 F.3d 110, 116 n.10 (3d Cir. 1995))); 59 AM. JUR. 2D, *Pardon and Parole* § 123 (2002) ("A denial of parole is not an increase in the sentence. Parole is a supervised release from incarceration prior to the termination of sentence and, conversely, the denial of parole has the effect of perpetuating the status quo, that is, continued incarceration during the term of sentence.").

decision to grant parole is *not* the "exercise[] of a 'sentencing' power,"[22] but, instead, is the "authority to commute or terminate an indefinite sentence that, but for the Board's discretion, would run until the maximum period is reached."[23] *Padilla v. Utah Bd. of Pardons & Parole*, 947 P.2d 664, 669 (Utah 1997). *See also In re Lynch*, 503 P.2d 921, 925 (Cal. 1973) (same).

Moreover, there would be substantial constitutional significance to treating a parole hearing as part of the sentencing process. For example, because of "the critical nature of sentencing," the Sixth and Fourteenth Amendments entitle a criminal defendant at sentencing to the right to be represented by counsel and the related right to effective assistance of counsel. *Mempa v. Rhay*, 389 U.S. 128, 134 (1967). *See also Golden v. Newsome*, 755 F.2d 1478, 1481-82 (11th Cir. 1985).

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[22] *See State ex rel. Bray v. Russell*, 729 N.E.2d 359, 362 (Ohio 2000) ("sentencing of a defendant convicted of a crime [is] solely the province of the judiciary"); *Budd v. Kinkela*, 2002 WL 1937134, at *3 (Ohio App. Aug. 20, 2002) ("determining parole is not a judicial function, but is purely executive in nature," and "[t]hus, the action of the [Parole Board] in denying appellant parole does not invade the sentencing province of the judiciary").

[23] *See generally French v. Cox*, 396 P.2d 423, 426 (N.M. 1964) ("[U]nder the indeterminate sentence law, the prisoner can only claim his debt to the state as being satisfied, as of right, upon expiration of the maximum period fixed by his sentence, less such good conduct time as may be provided by statute. The minimum sentence, less good time, merely fixes a date when, as a matter of grace and not of right, the prisoner may be permitted to serve the balance of his sentence outside the penitentiary, under such circumstances and conditions as the parole authorities may provide."); *People v. Montgomery*, 669 P.2d 1387, 1392 (Colo. 1983) ("[P]arole is a matter of grace and the granting or denial of parole is an executive, not a judicial, function."); ARTHUR W. CAMPBELL, LAW OF SENTENCING § 17:6 (2d ed. 1991) ("the decision to grant parole is a matter of executive grace").

Were Petitioners correct in their novel assertion that "[u]nder Ohio law, sentencing authority is divided between the courts and the [parole board]," and that "parole officials exercise sentencing discretion and make sentencing decisions" (Pet. Br. at 20), the Sixth Amendment right to counsel would extend through the "parole phase" of sentencing, which is not presently the law. *See, e.g.*, *McGee v. Aaron*, 523 F.2d 825, 827 n.2 (7th Cir. 1975) (no right to counsel during parole proceedings). Indeed, this very argument was considered and rejected in *Ganz v. Bensigner*, 480 F.2d 88 (7th Cir. 1973) (Stevens, J.):

> Plaintiff argues that if the sentence is of indeterminate length, the sentence process includes the proceedings before the Parole Board. Logically, that argument would support a conclusion that "the entire range of correctional process after sentencing is a part of the criminal proceeding" – a conclusion we have already rejected. . . . "Parole arises after the end of the criminal prosecution, *including imposition of sentence*."

Id. at 89 (citations omitted, emphasis added).

Furthermore, the flexibility and utility of parole proceedings would be significantly curtailed because of other constitutional requirements that would attach – including the Sixth Amendment's jury trial right and the Fifth Amendment's guarantee against double jeopardy. For example, in Ohio (as in most other states that still use indeterminate sentencing and parole), the Parole Board assigns "an offense category score" to determine a guideline range for parole release; however, the board may exceed such guidelines when it determines that the crime involved "aggravating factors," "including crimes that did not result in conviction." *Viceroy v. Ohio Dep't of Rehabilitation and Corrections*, 2003 WL 22389868, at *2-3 (Ohio App. Oct. 17, 2003). If parole proceedings are in fact recognized as part of the sentencing phase, then under this Court's precedent parole boards might well be precluded from

exceeding the parole range guidelines based on facts that were not put to the jury. *See, e.g.*, *Blakely v. Washington*, 124 S. Ct. 2531 (2004).

Likewise, the doctrine of collateral estoppel embodied in the Fifth Amendment's guarantee against double jeopardy would also come into play to prohibit a state parole board from, for example, considering earlier criminal activity that was part of an indictment dismissed with prejudice.[24] Currently, parole authorities can look to this information in deciding whether a prisoner is fit for parole. *See also Mayrides v. Ohio State Adult Parole Auth.*, 1998 WL 211923, at *4 (Ohio App. April 30, 1998); *cf. Standlee v. Rhay*, 557 F.2d 1303, 1307 (9th Cir. 1977) (the doctrine of collateral estoppel, as embodied in the Fifth Amendment guarantee against double jeopardy, did not prohibit a state parole board from finding the petitioner guilty of parole violations following acquittal on the same charges in a criminal trial).

All of these potential constitutional restrictions would, of course, substantially interfere with parole boards by limiting not only the material that they may consider, but also the processes that they may employ. Ultimately, this would

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[24] In *State ex rel. Lipschutz v. Shoemaker*, 551 N.E.2d 160 (Ohio 1990), the Ohio Supreme Court held that the Parole Board could deny parole based on criminal conduct that did not result in a criminal conviction. In *Shoemaker*, the defendant had been indicted on two counts of aggravated murder, had pled guilty to the first count, and had succeeded in having the second count dismissed. *Id.* at 161. Nonetheless, the Parole Board later denied parole on the ground that the defendant had committed two murders. *Id.* The Ohio Supreme Court upheld this result because it found that the Board had a rational basis for concluding that the defendant had committed two murders and that considering such wrongdoing was authorized by the state parole guidelines. *Id.* at 162. *See also, e.g.*, *Banks v. State*, 920 P.2d 905, 908 (Idaho 1996) (parole board could deny parole because of offenses for which prisoner had been acquitted when prisoner's own statement indicated rational basis for allegations).

undermine the central mission of parole boards – *i.e.*, to determine an individual's fitness to be at liberty in society. *See generally Greenholtz*, 442 U.S. at 13 (parole "is a component of the long-range objective of rehabilitation," and parole decisions are "necessarily subjective in part and predictive in part" to that end).

In sum, Petitioners' novel contention that parole decisions are "sentencing decisions" lacks any support in law or policy.[25] Parole decisions do not set a period of confinement and, thus, are not the cause of a prisoner's being "in custody in violation of the Constitution" or federal laws so as to trigger habeas jurisdiction or implicate *Heck*'s bar to a § 1983 suit.

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[25] Petitioners cite *Mistretta v. United States*, 488 U.S. 361 (1989), for the proposition that parole decisions are in fact "sentencing decisions." (Pet Br. at 21.) The holding in *Mistretta*, of course, had nothing to do with federal parole, but addressed whether the creation of the United States Sentencing Commission to devise guidelines to be used for sentencing violated the constitutional separation of powers. *Id.* at 362-63. Any discussion of parole was simply background *dicta* since, in creating the Commission, Congress "prospectively abolish[ed]" parole. *Id.* at 367.

But the *Mistretta* Court was clear that parole is a discretionary "release decision[]," and that it is the judge that makes the actual "sentencing" decision. *Id.* at 363 ("[Indeterminate sentencing and parole] obviously required the judge and the parole officer to make their *respective sentencing and release decisions* upon their own assessments of the offender's amenability to rehabilitation." (emphasis added)). Indeed, the Court went on to add that federal parole was "the discretion to release a prisoner before the expiration of the sentence imposed by the judge." *Id.* at 364-65.

2. Under *Heck* And *Balisok*, A § 1983 Suit That Would Nullify A State Administrative Proceeding Is Only Barred If The Suit Would Also Establish The Invalidity Of The Prisoner's Term Of Confinement

Separate and apart from whether a parole denial is a sentencing decision, Petitioners urge the Court to extend *Heck* to bar challenges to all state administrative (as well as judicial) decisions that are related in any way to an inmate's term of incarceration. Indeed, Petitioners identify as the primary error of the court below its construction of the *Heck* bar as limited to § 1983 claims that necessarily imply the invalidity of the fact or term of an inmate's incarceration. (Pet. Br. at 3, 17.) Because a § 1983 action such as Respondent's that challenges the parole guidelines or procedures can only produce a new hearing (or nominal damages and other prospective injunctive relief), and cannot result in an order ending or shortening the term of incarceration, the court below found the *Heck*-bar to be inapplicable. Petitioners (and the dissent in the court below) argue, by contrast, that "the Court's statements in *Heck* and *Balisok*, as well as the facts and results in those cases, make it plain that invalidation is measured by the implications of the federal claim *for the state decision*, not the implications for the prisoner's confinement."[26] (*Id.* at 17 (emphasis in Pet. Br.).)

The brunt of Petitioners' argument is thus that *Heck* and *Balisok* have somehow extended habeas jurisdiction far beyond the actual text of § 2254(a) – beyond a claim "that [a

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[26] Judge Gilman's dissent likewise asserted "that the majority opinion's test is contrary to the holdings of *Heck* and *Edwards*." (Pet. App. at 23a; 329 F.3d at 474.) After summarizing the rulings of those cases, the dissent concluded: "In other words, it is the implied invalidity of the administrative hearing itself – that can be corrected only by a new hearing – that is an impermissible result of a § 1983 claim."

prisoner] is in custody in violation of" federal law.[27] In their view, the inmate's legal claim need not, if successful, "necessarily imply" anything about the legality of the inmate's term of incarceration. For Petitioners, as for the dissent below, habeas has somehow become the exclusive avenue of relief for all inmate challenges to state decisions that could, in some conceivable attenuated manner, impact when or whether the inmate will be released. (Pet. Br. at 23-24.) But this conclusion cannot be supported. In *Heck*, this Court held that:

> when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of *his conviction or sentence*; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.

512 U.S. at 487 (emphasis supplied).

Thus, *Heck* does not bar § 1983 challenges that do not require a federal court to resolve the validity of a prisoner's confinement. Nor, contrary to Petitioners' contention, does *Edwards v. Balisok*, 520 U.S. 641 (1997), in any way hold "that a federal decision necessarily implying the need for a new [parole] hearing falls within *Heck*'s bar." (Pet. Br. at 28.) Petitioners argue, in particular, that "*Balisok* applied the *Heck* bar to claims that would entitle a prisoner only to a rehearing, not to a definite reversal of the first hearing's result" (*id.* at 26), so that the same conclusion necessarily follows where an inmate challenges a denial of parole,

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[27] There exists an open question whether apart from claims that directly or necessarily demonstrate the invalidity of a state prisoner's fact or duration of confinement and thus must be brought in habeas, there is some category of claims that may be brought under both habeas and § 1983. For purposes of this case, however, the critical consideration is that Respondent's claims are not of the type that must be brought in habeas alone.

which, if successful, would likewise result in a new hearing (but not necessarily a different result). But this contention fundamentally ignores the nature of the relief at issue in *Balisok* and in this case.

In *Balisok*, the state prisoner challenged the loss of good-time credits resulting from an administrative disciplinary proceeding, arguing in part that the decisionmaker was biased and engaged in deception. As this Court recognized, if successful, the suit would result in the vacating of the administrative decision, which in turn would invalidate the withdrawal of good-time credits – *i.e.*, would invalidate the prisoner's longer term of incarceration that had resulted from the administrative decision. Thus, the Court "conclude[d] . . . that respondent's claim . . . based on allegations of deceit and bias on the part of the decisionmaker that *necessarily imply the invalidity of the punishment imposed*, is not cognizable under § 1983." 520 U.S. at 648 (emphasis added).

Where, as here, an inmate's challenge is to the procedures employed in a hearing at which parole is denied, the suit, if successful, would have no such direct impact. Unlike *Balisok*'s challenge to the revocation of good-time credits, this suit cannot result in an order whose consequence, either directly or by "necessary implication," is to hold invalid either the fact or the expected term of incarceration. It can only result in a new hearing, at which state officials would once again render a discretionary decision concerning the inmate's parole, this time employing the required procedures. There is, thus, a clear distinction between the challenge to a revocation of good-time credits at issue in *Balisok*, and a procedural challenge to denial of parole, at issue in this case. The first, if successful, would necessarily imply a shorter sentence; the second would not.

Petitioners seek to make much of the fact that in *Balisok*, as in the present case, a rehearing of the same administrative allegations was a likely consequence of any ruling in favor

of the inmate. (Pet. Br. at 26-28.) In particular, they note the *Balisok* Court's observation "that Balisok might well obtain the same results at a new hearing. 520 U.S. at 647-48." (Pet. Br. at 27.) Hence, they assert that *Balisok* is essentially like this case, since in both the ultimate time served might depend on rehearings that have yet to occur.

But the fact that success in the lawsuit may lead to a future administrative hearing decision favorable to the inmate is, standing alone, irrelevant to the determination of whether an inmate's claim may properly proceed under § 1983. Rather, this Court's decisions have focused upon the direct impact – and the "necessary implications" – that a successful lawsuit would have on the legality of the fact or expected term of the inmate's confinement. Indeed, whatever the subject of an inmate's lawsuit, it will often or even usually be true that the outcome of the suit will not be the last word in determining the inmate's term of incarceration. The fact that an action like the present one, which may through the mechanism of a new hearing later lead to a reduced term of incarceration, does not mean that such a result is a necessary implication from the suit itself, or that such an action under § 1983 is therefore improper. *See, e.g.*, *Muhammad*, 124 S. Ct. at 1306 ("administrative determinations do not as such raise any implication about the validity of the underlying conviction, and although they may affect the duration of time to be served (by bearing on the award or revocation of good-time credits) that is not necessarily so").

In sum, the critical distinction between Balisok's claim on the one hand, and Respondent's claim on the other, is that, for Balisok, success in his lawsuit led directly – unless later modified – to a shorter stay in prison; for Respondent, a

successful suit carries no such necessary implication for the legality of the fact or expected term of his confinement.[28]

C. Petitioners' Arguments Based On Comity Do Not Justify The Requested Departure From The Law As It Has Been Articulated By This Court

Petitioners assert that "concerns of comity and federalism often require that § 1983 not receive the full breadth that its language suggests" (Pet. Br. at 43), and that "limiting" § 1983's "literal text" here would afford state courts a "fair possibility" to resolve the claims (*see* Pet. Br. at 45-48), and would limit disruptive federal interference in state prison management (*see* Pet. Br. at 41-42).

These vague (and one-sided) notions of comity and federalism, however, have no relevance to the statutory-interpretation question presented here: whether Respondent's

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[28] This Court's decisions last term confirm that the relevant inquiry, for *Heck* purposes, is the impact of success on the legality of the prisoner's length of custody:

> Although damages are not an available habeas remedy, we have previously concluded that a § 1983 suit for damages that would "necessarily imply" the invalidity of the fact of an inmate's conviction, or "necessarily imply" the invalidity of the length of an inmate's sentence, is not cognizable under § 1983 unless and until the inmate obtains favorable termination of a state, or federal habeas, challenge to his conviction or sentence. This "favorable termination" requirement is necessary to prevent inmates from doing *indirectly* through damages actions what they could not do directly by seeking injunctive relief – challenge the fact or duration of their confinement without complying with the procedural limitations of the federal habeas statute.

Nelson v. Campbell, 124 S. Ct. 2117, 2124 (2004) (internal citations omitted). *See also Muhammad*, 124 S. Ct. at 1304 n.1, 1306 (criticizing the "mistaken view expressed in Circuit precedent that *Heck* applies categorically to all suits challenging prison disciplinary proceedings" and confirming that "the incarceration that matters under *Heck* is the incarceration ordered by the original judgment of conviction").

claims must proceed under the narrow confines of habeas jurisdiction as provided by § 2254(a), or whether they may be pursued under § 1983. Petitioners fail to recognize that, absent such a statutory conflict, this Court has "no authority to narrow the 'broad language' of § 1983, which speaks of deprivations of 'any' constitutional rights, privileges, or immunities, by '[e]very' person acting under color of state law, and to which '[this Court] ha[s] given full effect [by] recognizing that § 1983 'provide[s] a remedy, to be broadly construed, against all forms of official violation of federally protected rights.'" *Heck*, 512 U.S. at 502 (Souter, J., concurring). And as demonstrated above (*see supra* Sections II(A) & II(B)), neither under the terms of the habeas provision nor this Court's decisions would challenges under § 1983 to parole guidelines and procedures be barred. Comity and federalism do not warrant extending *Heck* further, as Petitioners suggest.

Equally unavailing is Petitioners' contention that this Court should not allow § 1983 to "receive the full breadth that its language suggests" because of "[t]he state interest in prison management." (Pet. Br. at 43, 44.) *First*, Petitioners never explain how a successful § 1983 suit to obtain a new parole hearing would improperly interfere with a state prison system. Indeed, there is no reason to suppose that it would, because (as the majority opinion below recognized) the most that success on such a claim would yield a prisoner is "a new hearing that would follow the appropriate procedures under Ohio law" (Pet. App. 17a); the discretionary authority of the Parole Board to grant or deny parole would remain unhampered.

Second, if requiring a new hearing were indeed enough to improperly impede a state's management of its prison system, then there would be no principled basis for distinguishing among any number of other § 1983 claims. For example, there is no reason to believe that challenges to the procedures employed in a parole proceeding would be any more disruptive of the states' "important" "interest in

prison management" than a suit challenging disciplinary segregation for misconduct, *see, e.g.*, *Sandin v. Conner*, 515 U.S. 472 (1995), objecting to a prison rehabilitation program, *see, e.g.*, *McKune v. Lile*, 536 U.S. 24 (2002), seeking access to "adequate [prison] law libraries or adequate assistance from persons trained in the law," *see, e.g.*, *Bounds v. Smith*, 430 U.S. 817 (1977), protesting limitations on certain religious practices, *see, e.g.*, *Cruz v. Beto*, 405 U.S. 319 (1972) (*per curiam*), or requesting adequate medical care, *see, e.g.*, *Estelle v. Gamble*, 429 U.S. 97 (1976). Yet, each of these challenges is cognizable under § 1983.

Finally, Congress has already ameliorated any risk of improper interference with state prison management through Section 802 of the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321, 1321-66. For example, the Act requires that inmates exhaust available state administrative remedies before bringing a § 1983 challenge such as Respondent's here, 42 U.S.C. § 1997e(a), and it mandates that a district court "shall," on its own motion, dismiss "any action brought with respect to prison conditions under section 1983 . . . if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from relief," 42 U.S.C. § 1997e(c)(1).

* * *

At bottom, *Preiser* and *Heck* aim to square § 1983's expansive language with the narrowly-tailored relief afforded under the federal habeas statute in order to prevent state prisoners from circumventing the habeas exhaustion requirements. Here, no matter how successful, Respondent's claim would not jeopardize his underlying conviction or sentence, would not itself result in an immediate or speedier release, and would have no necessary consequence for the legality of his expected term of confinement. Thus, there is

no basis to judicially foreclose an otherwise viable § 1983 action that neither clashes with the federal habeas statute nor requires limitation "for the sake of honoring some other statute or weighty policy." *Spencer v. Kemna*, 523 U.S. 1, 20 (1997) (Souter, J., concurring).

III. IN ANY EVENT, BECAUSE OHIO HAS AFFORDED RESPONDENT A SECOND PAROLE HEARING, HIS ONLY REMAINING CONTENTIONS ARE CLAIMS FOR PROSPECTIVE RELIEF AND NOMINAL DAMAGES THAT ARE PLAINLY COGNIZABLE UNDER § 1983

As discussed above (*supra* at 1, 10, 24), Ohio granted Respondent a new parole hearing in July 2001 while this case was pending in the court of appeals. Of course, the nature and adequacy of the 2001 hearing played no part in the proceedings in the district court, whose decision was rendered before that hearing. Respondent advised the court below of the occurrence and outcome of the July 2001 parole hearing in his *en banc* briefing, but raised no challenge to that hearing at that time.[29] At no point did the decision of the court below, or the dissent, reference the July 2001 hearing. The case now before this Court does not embody any challenge to the latter hearing.

As a result, there is at issue no parole hearing with any continuing consequence whatsoever for Respondent's confinement. The April 1999 hearing (which is the subject of this suit) no longer has any bearing on Respondent's parole status, and the operative July 2001 hearing is not challenged in this suit. Accordingly, this case comes before the Court essentially as a request for declaratory and

[29] *See* Supplemental Brief of Plaintiff/Appellant Rogerico Johnson to the Sixth Circuit, at 2 n.2 (dated Oct. 25, 2002).

prospective injunctive relief – both on Respondent's behalf[30] and for a class of similarly-situated state prisoners[31] – encompassing no live challenge to a parole hearing at all.[32] Thus, these claims would not fall within the reach of the habeas provision (*i.e.*, habeas would be unavailable) even if one were to accept Petitioners' invitation to expand habeas jurisdiction to include state prisoner suits that would "invalidate" a parole hearing. (Pet. Br. at 23-25.)

Assuming, contrary to our argument in Section II, *supra*, that an inmate's action seeking a new parole hearing is *Heck-*

[30] Respondent Johnson has standing to assert this claim because he will be subject to further parole hearings and because, as he alleges in his complaint through supporting affidavits from fellow inmates, Ohio has routinely and broadly employed these flawed procedures and may well apply them to Johnson again in the future. Respondent, therefore, is entitled to seek individual prospective injunctive relief to ensure that his future hearings are conducted in a manner consistent with due process.

In any event, because – as was true of the claim for prospective injunctive relief in *Balisok*, 520 U.S. at 648-49 – neither the court of appeals nor the district court considered the injunctive claim, any questions about standing here should similarly be reserved for the "lower courts on remand." *Id.* at 649.

[31] Respondent Johnson also attached numerous affidavits from other Ohio prisoners that assert the flawed procedures employed in his prior parole proceeding are employed by Ohio as a pattern and practice. (J.A. 55-73.) Johnson is permitted to pursue these class claims for prospective injunctive relief as part of his § 1983 suit here. *See, e.g., Wolff v. McDonnell*, 418 U.S. at 554-55 (holding that § 1983 is a permissible vehicle for a class representative of state prisoners who seeks an "injunction enjoining the prospective enforcement of invalid prison regulations" that authorized the "taking of good time credits in violation of the due process clause").

[32] In addition, Respondent is entitled to seek (and has stated both to this Court and the court of appeals below that he intends to request) nominal damages relief based on the alleged due process/equal protection violations that occurred in the April 1999 parole hearing. *See, e.g., Carey v. Piphus*, 435 U.S. 247 (1978).

barred, there is language in *Heck* arguably suggesting that the bar remains applicable even where, as here, a habeas challenge is not available. *Heck*, 512 U.S. at 489 ("Even a prisoner who has fully exhausted available state remedies has no cause of action under § 1983 unless and until the conviction or sentence is reversed, expunged, invalidated or impugned by the grant of a writ of habeas corpus."); *see also Spencer*, 523 U.S. at 17 (stating in *dicta* that a § 1983 action for damages is not "always and everywhere" available). Such reasoning should be rejected as unduly limiting the scope of § 1983 for no good reason.

The entire purpose of the *Heck* bar is to prevent prisoners from using § 1983 to circumvent the habeas exhaustion requirement. *See Heck*, 512 U.S. at 486-87. Where (as here) circumvention is no longer at issue because a habeas action would be unavailable, there is no basis in law or policy for barring a prisoner's § 1983 claim. *See id.* at 503 (Souter, J., concurring) ("I would not cast doubt on the ability of an individual unaffected by the habeas statute to take advantage of the broad reach of § 1983.").

Indeed, where habeas is no longer available, the only result of precluding a § 1983 suit would be to strip state prisoners of any means whatsoever to vindicate their constitutional rights in federal court – either through prospective injunctive relief or nominal damages.[33] This was clearly not Congress' aim when it enacted the habeas statute. *See Heck*, 512 U.S. at 501 (Souter, J., concurring) ("It is one thing to adopt a rule that forces prison inmates to follow the

[33] This, of course, assumes that the unavailability of habeas is through no fault of the inmate. If, for instance, habeas is "unavailable" because the applicable one-year statute of limitations has expired, 28 U.S.C. § 2244(d), no § 1983 action should lie because permitting such a claim would allow inmates to circumvent the habeas exhaustion requirements and purposely take steps to eliminate their habeas remedies.

federal habeas route with claims that fall within the plain language of § 1983 when that is necessary to prevent a requirement of the habeas statute from being undermined. . . . It would be an entirely different matter, however, to shut off federal courts altogether to claims that fall within the plain language of § 1983."); *see also*, *Spencer*, 523 U.S. at 19-21 (Souter, J., concurring); *id.* at 21-22 (Ginsburg, J., concurring); *id.* at 25 n.8 (Stevens, J., dissenting). *See generally* RICHARD H. FALLON, DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS & THE FEDERAL SYSTEM 1451 (5th ed. 2003). Indeed, Congress only sought to create an exception to § 1983 where a habeas action more properly lies; but where no such habeas action would be available, § 1983 returns to fill the void. *Heck*, 512 U.S. at 499, n.4 (Souter, J., concurring); *see also Spencer*, 523 U.S. at 20 (Souter, J., concurring); *id.* at 25 n.8 (Stevens, J., dissenting).

In sum, neither Respondent's claims for declaratory and prospective injunctive relief, nor for nominal damages, would have any necessary consequence on the legality of his continued custody, or even upon any operative parole decision at issue in this case. Accordingly, on the facts before the Court, Respondent is entitled to proceed under § 1983 even if Petitioners were correct that habeas is the exclusive vehicle for attacks on parole hearing decisions that, if successful, would warrant a new hearing.[34]

[34] It is particularly imperative that Respondent be allowed to assert a § 1983 nominal damage claim based on the procedural irregularities in the April 1999 hearing. *Cf. Carey*, 435 U.S. at 266-67 (allowing nominal damages for due process violations). That could prove his only means to vindicate the alleged constitutional violations in the event that he is unable to establish the more demanding criteria for prospective injunctive relief.

CONCLUSION

The court of appeals' decision reinstating Respondent's case should be affirmed.

Respectfully submitted,

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October 15, 2004

OHIO PAROLE BOARD DECISION

Name:	**Inmate No.:**	**Date:**
ROGER JOHNSON	A198212	7/27/01

Hearing Type:	**Security Level:**	**Sentence:**	**Max/Eds/Est** (circle one)
REHEAR	HIGH MAX	10-30 yrs	2-17-2021

1. The (offense) (parole violation) behavior has been rated as Category 8 because the offense behavior involved (Circle appropriate behavior):

Rescind/Rehear CII R19 Resched O/A 12/31/86, while occupying a taxi as a fare, inmate grabbed taxi driver around the throat put gun to his head. Inmate hit driver on side and front of head with pistol. Weapon was discharged during commission of felony.
Section No.(s): 321(b)

2. The Criminal History/Risk Score is 1.

3. The Guideline Range is 60-84 months.

4. Time served 172 mos + JTC 6 (178 days) mos = Total Time Served 178 mos. TPV Arrest Date: _____

5. Check if non-applicable ____. The inmate has committed new felony criminal conduct in a prison facility that is rated as
   Category __ because it involved: See Supplemental Sheet
   Revision of C II R 19's Section No.(s): _____

   The Rescission Criminal History/Risk Score is _____
   This conduct requires __ months be added to the guideline range.

6. Check if non-applicable _____

A. The inmate has committed __2__ disciplinary infractions involving non-felonious threatening conduct against staff and/or non-felonious possession of a dangerous instrument (6-12 months per infraction to be added to the guideline range) that occurred on the following dates:

(12-24)
4/15/92 C II R 8 sharp piece contraband
6/95 C II R 8 weapon used to slash another inmate

B. The inmate has committed _____ disciplinary infractions involving possession or use of alcohol and/or possession or use of a controlled substance other than possession of a controlled substance with intent to distribute (3-6 months per infraction to be added to the guideline range) that occurred on the following dates:

_____

C. The inmate has committed _____ disciplinary infractions involving other misdemeanor conduct (0-6 months per infraction to be added to the guideline range) that occurred on the following dates:

_____

D. The inmate has committed __13__ other significant disciplinary infractions (0-2 months per infraction to be added to the guideline range) that occurred on the following dates:
See supplemental sheet (0 - 26)

This conduct requires 12 - 50 months to be added to the guideline range.

* * [End of page one of original form] * *

Name:	Inmate No.:	Date:
ROGER JOHNSON	A198212	7/27/01

7. Check if non applicable _____. The aggregate guideline range is 1:3,2 168-278 months.

Revision

60-84
6-12
70-132
54
12-24
0-26

8. After review of all relevant factors and information presented.

X A. A decision outside the guidelines at this consideration is not warranted. Therefore, the Board's decision is within the applicable guideline range.

___ B. Rescission guidelines were used to address rescission behavior since the last time setting hearing, and the aggregate guideline range is exceeded.

___ C. A decision (Above/Higher) (Below/Lower) the guidelines is warranted because:

___ (1) The Inmate's offense behavior involved the following specific (aggravating) (mitigating) factors:

___ (2) The Inmate is a (poorer) (more serious) (better) risk than indicated by his/her criminal history score for the following specific reasons:

___ (3) Other specific reasons:

List number of guideline ranges departed:
Vertical _____ Horizontal _____
List selected guideline range: _____ months

Panel recommends middle of aggregate range inmate has numerous serious violations and is currently high max inmate.

9. Total time to be served 223 to con't months.
45 mo to con't.

10. Optional Outstanding Program Achievement
___ granted X not granted
(Note: The granting or denying of such credit is discretionary.)

The Board's decision includes a _____ month credit to outstanding program achievement as specified below:

11. Adjusted total time to be served _____ months.

12. Recommendation: con't 4/2005 & CO to notify

13. Institutional conditions prior to PRD on next hearing: _

14. Hearing Panel:
Board Member: s/REL Hearing Officer: s/RAH SRW

Release on PRD is contingent on good institution behavior and/or reduction from maximum security status.

A PRD may be extended for a Class II violation when the case is reviewed at the PRD Pre-Release Review.

* * [End of page two of original form] * *

Name:	Inmate No.:	Date:
ROGER JOHNSON	A198212	7/27/01

SUPPLEMENTAL OHIO PAROLE BOARD DECISION

(List the number of the applicable Ohio Parole Board Decision Section and the additional information.)

¶5 C II R 19 Assault [Illegible] 1(W)(2)
Inmate threw hot liquid in unit manager's face
O/A 7/6/97
7/97 C II R 19 Assault CO (6) 18
A/S 11/96 C II R 19 weapon under disability CO 13 (R1B) (6)18
9/91 C II R 19 Assault (inmate) (6) 6
3/92 C II R 19 Assault (6) 18
4/92 C II R 19 Arson (6) 18
6/95 C II R 19 Agg Assault (6) 18
9/95 C II R 19 Assault (6) 18
12/95 C II R 19 Assault (6) 18
40-132
¶ 6D 54 -
4/18/92 C II R 9, 19 1/94 C II R 1
5/27/92 C II 4, 15 10/94 C II R 14
10/93 C II R 1 11/94 C II 1, 4
2/94 C II R 12 6/95 C II R 8
10/93 C II R 4 7/95 C II R 3
12/92 C II R 4 6/95 C II R 3
2/96 C II R 4, 12